

THE NEW WAQF LAW PREPARED BY IDB/IRTI AND THE KUWAIT
PUBLIC FOUNDATION: A CRITICAL ASSESSMENT

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INTRODUCTION

There is a huge need in the Islamic world to revitalize the waqf system. The currently dilapidated state of waqfs in most countries should actually be considered as an opportunity to design a thorough reform taking into consideration not only the classical Islamic waqf law but also the latest practices and norms in the west. It is to be hoped that such a synthesis of the classical Islamic and modern western practices and norms in conformity with the *Shari`ah* will lead to an ideal waqf law that can be of vital importance for the restoration of this institution.

Looked from this perspective, the IDB/IRTI and the Kuwait Public Foundation should be congratulated for preparing a waqf law to be proposed to the entire Islamic world.¹ In what follows, I will try to assess this law from the above perspective .

The law starts with an ambitious tone and states that it will be a superior law of waqfs and any existing law in contradiction to it will be abolished. This tone is then somewhat scaled down with the statement that the preface will be written subject to the constitution of each country. If an ideal law was prepared (and I am in agreement with most of the principles of this draft law) and the whole Islamic world embraced it, this would have obviously a very positive impact. But Islamic world is a huge place and there are myriad of vested interests. Consequently, while many items of the law might be embraced, I doubt if it would be applied *in toto*. With this *caveat*, let us now look at the details.

ESTABLISHMENT

According to the classical Islamic law, a waqf is born when a wealthy person goes to the local judge, *kadi*, and declares his intention to establish a waqf. The *kadi* then records the amount of the *corpus* being donated for the purpose, subject to the

¹ I am grateful to Dr. Adnan Ertem, the General Director of Waqfs in Turkey, for having provided me with a Turkish translation of this important document.

condition that the capital is the private property of the founder. Thus, according to the classical tradition, there are two conditions at this initial stage; that the capital must be privately owned and that it must be registered with a local court.

Concerning registration, the IRTI-KPF draft law demands that when a person wishes to establish a new waqf, the founder must inform the local court, which will register it. The founder is also obliged to report his decision to the Association of Awqaf (The decree, item 72).

This is the traditional and, in my opinion, the correct way to establish a waqf. While I am in favour of informing the local court, the traditional method, and the Awqaf Association, I must warn against informing a state agency. History informs us that informing the state of its establishment can be detrimental for a waqf. Waqfs should operate as decentralized autonomous institutions without state interference.

In the United States unincorporated associations and trusts do not have to register with any state authority at all. Only incorporated associations requesting tax exempt status, need to register. The huge advantage of the American system is that it allows groups of people to meet together to pursue common purposes without having to obtain official approval or even acknowledgement. The disadvantage is that it makes it difficult to gauge the size of this sector.²

The American approach is very similar to the original Islamic norm, that is the establishment with kadi's approval alone. The New IRTI/KPF draft waqf law, correctly, provides for this. But it is important that the information given to the courts and the Awqaf Association stay with these institutions and are not conveyed to a state agency. Historical experience informs us that registration is the first step for state interference in waqf affairs.

OWNERSHIP OF THE CORPUS

Concerning the condition of private ownership of the waqf's corpus, the IRTI/KPF draft makes clear that the endowed property must be the private property, *mulk*, of the founder (Item 6).

² Salamon, *A primer*, p. 21.

During the last century this condition has been relaxed when Iran confiscated the late Shah's property and established new waqfs with it. In Turkey and Malaysia also the state became an active waqf founder.³ There is nothing wrong with this, providing the state established waqf has complete independence from the very state that has established it. On this issue, I would like to point out to the establishment of the Stiftung Volkswagenwerke in Germany. After the Second World War, two states, the state of Niedersachsen and the federal one, agreed to establish with the capital of the Volkswagenwerke, which they owned, a Stiftung, foundation, for promoting scientific research. Although established with state money, the complete independence of the foundation from state interference was planned with great care. In short, establishment of a foundation with state money might be acceptable providing the foundation is granted complete independence from the very state that establishes it. If this is not provided, the foundation can be impeded by bureaucratic inertia, even, corruption. The draft, correctly, allowed the endowment of only privately owned property. But this may create problems with the waqfs whose capital are state owned. While the law makers might allow for such waqfs, it is imperative that the law also insists on their independent and autonomous management.

TYPES OF WAQFS

The IRTI/KPF draft law recognizes primarily the following three waqf types (Item 2):

- a) waqf khayri, charitable waqfs
- b) waqf ahli, family waqfs and
- c) hybrid waqfs.

Thus, family waqfs abolished in much of the Islamic world under the pressure of the colonial powers during the 19th and 20th centuries are now being re-established.⁴ This is clearly an important development. While this is so, the draft needs to take into consideration the following types as well.

³ To name just a few; in Iran, *Bunyard-i Mustaz'afan*, and *Bunyard-e Panzdah-e Khordad*, in Turkey *Diyanet Vakfi*, in Malaysia the *Johor Foundation* as well as *Yayasan Waqaf Malaysia* were all established by state funds.

⁴ Procedural Appendix, items 3 and 31.

d) Incorporated waqfs: These are waqfs that enjoy full incorporate status. Thus they can sue and be sued. They also provide full owner and entity shielding to their trustees. In the United States, such foundations enjoy full tax-exemption.

e) There are six types of waqfs that are officially recognized by the latest waqf regulation of 2008 in Turkey.⁵ Referring only to the most important ones;

- 1) *Mazbut vakıflar* are those that survived from Ottoman era. Not having their original founders or their descendants as their trustees, they are managed by the General Directorate of Waqfs. The IRTI/KPF draft should recognize such waqfs. Indeed, what happens when the founders and their descendants disappear? Since waqfs are essentially perpetual institutions, such a possibility must be seriously considered. Such waqfs need a central authority to manage them. Within the framework of the IRTI/KPF draft, it is the Association of Awqaf which should provide this.
- 2) *Mülhak Vakıflar* are those that are still managed by their original founders or their descendants. As mentioned above, such waqfs should enjoy full incorporation with owner/entity shielding as well as full tax-exemption. The third and fourth categories represent Ottoman practice being reflected in modern republican norms.
- 3) *Mukataali Vakıflar* pertain to properties built upon waqf lands. Originally accepted by the Hanbelis, this waqf type also known as *Hukr*, has been eventually accepted by all schools. The Lebanese law of Real Estate Ownership refers to this as *muqata`a ijarah taviilah*.⁶ The *modus operandi* of these waqfs is as follows: the land is the property of the waqf and a developer rents this waqf land on the basis of *ijarah taviilah*, long term rent. Leasing waqf property for the long term is usually not permitted, but *Hukr* constitutes an exception. The developer rents the land on long term basis and builds upon it. The building belongs to the developer and as long as he pays his rent for the land regularly, he enjoys full ownership rights over the

⁵ MEB Mevzuat Bankası, *Vakıflar Yönetmeliği*, pp. 1-2.

⁶ Akgunduz, *Vakif Muessesesi*, p. 392.

building he has built. The developer enjoys this right for as long as he lives and he can even transfer it to his descendants.⁷

Concerning the level of rent, two factors are important. First, the rent paid by the developer should not be lower than the prevailing rent, *ajr misl*, paid by other tenants in the neighbourhood. Second, if the neighbourhood of the leased property develops, the original rent agreed upon can be increased.

This classical arrangement has recently been somewhat changed in Turkey so as to enable the land owner (waqf) to enjoy greater income. When a developer wishes to build upon waqf land, the ownership of these properties are split between the waqf, owner of the land, and the developer who built and developed this land usually into residences or shopping centers or a combination of both. The exact ratio of ownership of the developed property, i.e., number of flats, is determined as a result of bargaining and the waqf receives annual rent from the units it owns.

The new draft law should take into consideration both the classical *Hukr* and its modern version, flat sharing, described above. This is because, the latter provides higher revenue for the waqf than the former, whereby the waqf receives rent from the developed property instead of the undeveloped land.

Mukataalı Vakıflar may well be highly relevant for contemporary Malaysia, where waqf assets with development potential are estimated to be about 40 billion RMs (12.5 billion USD), which may well dwarf most other asset forms managed by the Islamic finance industry.

- 4) *Icareteynli Vakıflar* are defined by the Turkish Waqf Law of 2008 as those waqf properties rented out on long term basis, without any fixed term. This category was invented by Ottomans when waqf properties were destroyed by earthquakes or fires. Faced with such disasters, tenants were asked to make a large lump sum payment, which the waqf used for rebuilding the premises. The tenants were then given long term rent contracts and continued paying

⁷ Akgunduz, *ibid.*, p. 396.

their usual rents. What the tenants gained in this process was a status of quasi ownership, which allowed them to continue using the premises for the long term subject to the payment of annual rents, while the waqf was enabled to rebuild its premises.⁸

There are number of serious objections to the *ijaratayn* arrangement. First, the exact period of the long term rent is unclear. Second, the annual rent tenants continued paying often tended to become less than the prevailing rent in the neighbourhood, *ajr misl*. Third, the fact that the descendants of the tenant can take over the property, thus diluting the property right of the waqf even further. In view of these serious objections, it is difficult to recommend that this lease form be included in the new draft law. But on the other hand, the problem of what happens to the waqf property in case of a natural disaster needs to be taken into consideration. One possible way out of this problem can be the modern *takaful*, or Islamic insurance.

THE NATURE OF THE *CORPUS*

The next question concerns the nature of the capital, *corpus*, with which the waqf is established. Classical Islamic law recognizes primarily real estate waqfs. Waqfs established with cash were discussed and permitted by Imam Zufar back in the eighth century, subject to the condition that the cash capital of the waqf should be invested in *mudaraba* partnerships and the returns spent for the purpose of the waqf. Wide spread application, however, and then not exactly remaining true to Imam Zufar's *mudaraba* formula, was observed first in the Ottoman empire during the fifteenth century as an informal practice. These waqfs then became very popular, which triggered a long lasting debate.⁹ Finally, they were formally permitted during the late sixteenth century by a sultanic decree, thus becoming a norm. Initially limited to the Ottoman Empire, they were eventually approved in Egypt, Iran as well as in the Indian sub-continent with a long delay at the beginning of the 20th century. Moreover, this approval covered not only cash, pure

⁸ This lease form was controversial among classical jurists. For details of the controversy the reader is referred to Akgunduz, *Vakif Muessesesi*, pp. 356-363.

⁹ Mandaville, "Usurious Piety".

and simple, but also shares of joint stock companies.¹⁰ Such waqfs are now known as waqf of stocks.

The importance of the waqf of stocks should not be underestimated. The Ottoman cash waqfs invested their *corpus* with a financial method known as *istiglal*. This was a legal trick designed to disguise the rate of interest embodied. Modern waqfs of stocks, however, operate with shares of various companies, a method very similar to the *mudaraba* partnership practiced by the Prophet and demanded by Imam Zufar. Put differently, waqfs of stocks are truly profit and loss sharing partnerships, practiced and recommended by the Prophet himself.

Items 20, 21 and 22 of the procedural appendix, correctly, permit the establishment of a waqf with cash or company shares. Company shares can be endowed as the corpus of a waqf. The procedural appendix makes it clear that stocks are not for speculation but for the keeping.¹¹ The trustee is not permitted to sell the stocks unless he is authorized to perform *istibdal*. Waqf of stocks is now granted definitive legitimacy. Thus the centuries old debate on the legitimacy of cash waqfs is now brought to an end thanks to the waqf of stocks. To my knowledge, the earliest approval of establishing a waqf with company shares as well as European perpetual bonds (*rente*) had been granted back in 1907 when the “Mujtahid of Karbala” granted his approval for the waqf of stocks established with such instruments. This was followed in 1908 by the fatwa of the Mufti of Egypt based on the condition that such waqfs should be divided into shares which should be handed over to the trustee.¹² Thus, following the footsteps of these early 20th century fetvas, with the new draft law we have the definitive approval of waqf of stocks for the entire Islamic world.

In Turkey, in an effort to curb waqf founding, a paid in capital condition of at least 500,000 USD was imposed by a hostile government to anyone desiring to establish a waqf. Founders reacted to this by capital pooling. Recent research has shown that on average 35 persons founded a waqf, pooling among themselves the necessary capital.¹³ Most recently, in 2009, this requirement has been reduced to 50,000TLs by the newly established Board of Waqfs. Remarkably, after this ruling an

¹⁰ Çizakça, *Philanthropic Foundations*, ch. 3.

¹¹ *Ibid.*, item 21.

¹² Çizakça, *Philanthropic Foundations*, pp. 35-36, 40-41.

¹³ Çarkoğlu, “Bireysel Bağışlar”, p. 139.

improvement in the number of waqfs established has not been observed in Turkey, indicating that other more important factors, such as inadequate tax exemption, continue to play a negative role in this process.

Item 71 of the IDB/IRTI and the KPF Draft Law permits the establishment of a waqf by a group of founders. In view of above, I am in complete agreement with this. At this point the question comes to mind whether the law should impose any minimum capital condition to avoid the emergence of too small waqfs and to encourage capital pooling among the founders.

Currently, in Europe, there is a bewildering variety of rules regarding minimum capital needed to establish a foundation. European Union member countries demand from € 240 Euros (in Malta) to € 70,000 in Austria. In France, though there is no legal obligation, in reality, authorities insist on the ridiculously high amount of € 1,000,000.¹⁴ In the forthcoming *European Law of Foundations*, the founding assets must be equivalent to at least 25,000 euros, allowing the *corpus* in the form of real estate, cash, shares or a combination of all.

As the French example given above should demonstrate, imposition of any minimum capital condition can be exploited by a hostile state by pulling the amount to ridiculous heights. Moreover, the exact amount should depend on the general conditions and GNP/capita of the country in question! The authors of the law have therefore wisely refrained from imposing any such condition.

LEGAL PERSONALITY

Although the classical Islamic law does not clearly define this concept, jurists have long considered waqfs as entities with legal personality. Modern Muslim jurists like Zahraa, Zarqa and Sanusi are unanimous that the classical Islamic law, in fact, recognizes the concept.¹⁵ While this may well be so, it is not clear to what extent the classical Islamic law provides owner/entity shielding, both very important characteristics of the modern corporation. The most recent Turkish law of waqfs clearly grant legal personality to waqfs.¹⁶

All western laws also grant this status to foundations.

¹⁴ TÜSEV, *Vakıf ve Derneklere İlişkin*, pp. 4-5.

¹⁵ Çizakça, "Long-term Causes".

¹⁶ Vakıflar Kanunu, No. 5737, Accepted on Feb. 20th, 2008, Madde 4.

With the new IDB/IRTI-KPF draft law, waqfs are now granted legal personality. The new law, however, does not make it clear whether “owner and entity shielding” are provided. More work on this is needed.

TAX EXEMPTION

In modern times, all American public serving foundations are tax exempt, while member serving ones are not. The former also receive tax deductible gifts from individuals and corporations. To be eligible for this privilege, they have to serve recognized public purposes. In 1996, Americans contributed 139 billion USDs and 85 percent of these donations and gifts came from individuals, while only six percent came from corporations. The remaining nine percent came from other foundations. About half of these donations and gifts went to religious organizations while about 12.7 billions went to education.¹⁷

In the Islamic world, waqfs are, by definition, public serving. Even family waqfs become public serving entities when the family becomes extinct. Therefore, all waqfs, including the family waqfs, must be tax exempt. Because, thanks to their perpetuity, they represent sustained capital accumulation for serving the public.

In Turkey, however, tax exemption is only rarely granted. Only 2.7 to 4.5 percent of the waqfs established during the republican era have been granted tax exempt status and 24 percent of the such privileged ones are public waqfs.¹⁸ Recent research has revealed the very negative role of this situation on waqf founding. Asked whether the current state imposed rules and regulations impede waqf activities, 65 per cent of the trustees said, “yes”. Difficulties encountered in obtaining tax exempt status were the most cited impediment.¹⁹

In the European Union, each country has its own practices and norms regarding tax exemption leading to a bewildering variety. Even the most recent, forthcoming, *European Foundation Proposal* has not remedied this situation as it has allowed

¹⁷ Salamon, *A Primer*, p. 25.

¹⁸ Aydın, “Cumhuriyet Dönemi Vakıfları”, pp. 38-40.

¹⁹ Çarkoğlu, “Türkiye’de Bireysel”, pp. 154-55.

each country to apply its own norms.²⁰ About half of the European countries tax their foundations.²¹

Donations constitute another important source of income for waqfs in Turkey. Of the 237 waqfs questioned in 2002, while 45 per cent received less than USD 12,000, some 33 per cent received between 12,000 and 48,000.²² Waqfs receiving these donations do not pay income as well as inheritance taxes in Turkey. This is the same in all European countries with the exception of Denmark, where only some reductions are allowed.²³ For donors, however, a different situation prevails. In Turkey, a donor can deduct his donation, merely upto 5 per cent, off his taxable income.

When receiving donations, waqfs should not pay any taxes. This is the European norm. Equally important, donors should be permitted to deduct the whole of their donation from their taxable income.

Since the overall purpose of the IDB/IRTI and KPF draft law is to encourage waqfs in the Islamic world, tax exemption appears to be a very important concern. This is confirmed by the Turkish situation explained above.

Item 62 of the draft law exempts all charitable waqfs (khayri) from all taxation. This is a necessary but insufficient condition. Since waqfs are nonprofit organizations channelling all of their earnings, minus expenses, to charitable purposes, any tax imposed on them simply reduces the funds that could have been spent for these purposes. Tax exemption needs to be considered at three different levels: taxes imposed directly on the revenues generated by waqfs, taxes imposed on donors and finally, those imposed upon the profits generated by companies associated with waqfs. The draft law should recognize the need for all of these and provide tax exemption at all three levels.

Moreover, while the draft law exempts charitable waqfs from taxation, it is silent about family waqfs. Since family waqfs are potential charitable waqfs in that they

²⁰ European Commission, *Statute for a European Foundation*, p. 36.

²¹ TÜSEV, *Vakıf ve Derneklere İlişkin*, p. 17/65, table 8.

²² *Ibid.*, p. 145.

²³ TÜSEV, *Vakıf ve Derneklere İlişkin*, p. 19/65.

will convert into charitable waqfs when the family they are designed to support becomes extinct, they should be granted the same tax status as charitable waqfs.

SOURCES OF INCOME

As mentioned above, while Ottoman cash waqfs earned their income by lending their original capital with *istiglal*, quasi interest²⁴, modern waqfs of stocks obtain shares of joint-stock companies and thus become true partners of professionally managed firms ultimately sharing risks, profits and losses.

With the exception of the Czech Republic, all the members of the European Union allow their foundations to establish associated companies. So, this is the European norm.

Modern waqfs of stocks can also establish their own firms. Indeed, Turkish waqfs were allowed to establish associated companies already back in 1967. Currently, 24 per cent of Turkish waqfs possess commercial firms. A small group of these waqfs earned on average exceptionally high USD 400,000 annual revenue. Most, 70 per cent, however, earned less than USD 48,000 per annum. On the whole, 81 per cent of Turkish waqfs are reported to enjoy profits, which they either distribute as charity or add to their capital. Commercial revenue constitutes 42 per cent of Turkish waqfs' annual income, and is taxed.²⁵

While the IDB/IRTI and KPF draft law allows waqfs to obtain shares of various companies (procedural appendix, item 208), the draft is silent about waqfs actually establishing their own firms. This should be permitted just as companies establishing their own waqfs should also be permitted. Such flexibility enriches the waqf sector.

WAQF DURATION AND REVOCABILITY

Waqfs are generally known as perpetual institutions. Indeed, it is possible to find waqfs that have survived for centuries all over the Islamic world. The new IDB/IRTI and KPF draft law, however, has permitted establishment of fixed duration waqfs. Family waqfs are considered to be temporary waqfs (Draft Law

²⁴ *Istiglal* obeyed the letter of the Islamic law but violated its spirit. It was not based upon risk/profit/loss sharing but was a mere legal trick disguising interest.

²⁵ Çarkoğlu, "Türkiye'de Bireysel", p. 145.

item: 70/3; Appendix item 64). Although, the purpose is to make waqf establishment attractive, the word of the law is ambiguous here.

In the same context, revocability is also permitted subject to certain conditions. Indeed, the founder can change his mind and revoke his waqf. This rule settles another debate in classical waqf law which had led to a cumbersome procedure for waqf establishment in Ottoman era.

TRUSTEES

The law (24/2, appendix item 111) makes it clear that the trustee(s) are to be appointed by the founder. This condition is well known and reflects the classical law as well as centuries` long tradition. Yet, it challenges the current situation in Malaysia where the state religious councils are the sole trustees of all the waqfs in a given state. If this law is accepted in Malaysia, it can make the previous law null and void per item one above.

One of the novel items of the new draft law is that it permits the determination of the trustee`s wage by the founder as a certain percentage of the waqf`s profit or revenue (appendix, #137). Linking the trustee`s wage to the profitability of the waqf rather than making it a fixed monthly sum, this item makes the trustee strongly interested in the performance of the waqf. I consider this as a very important development in view of many critiques of waqfs in history, whereby this institution was labelled as the dead hand. Linking the trustees` income to the performance of the waqf should no doubt make these institutions more dynamic.

There is concrete evidence to support this view. Sadr and Sourì have studied the rental income generated by waqf owned stores in the grand bazaar of Teheran.²⁶ Their conclusion is startling: Of the three categories of waqfs they consider: those whose trustees are selected directly by the founder; those appointed according to the will of the founder and those directly administered by the Awqaf Organization, the average rental income of the stores in the bazaar administered by trustees appointed by the founder is 99.3, by the trustees appointed according to the founder`s will is 101.5 and administered by the Awqaf Organization is 34.7 thousand Rials respectively. The income of the first two categories, both run

²⁶ Sadr and Sourì, "The Role of Management", pp. 22, 24.

independently of the AO is almost three times of those run directly by the AO. This is despite the fact that the wages of the trustees of the first two categories are only indirectly linked to the performance of the waqfs they manage.

A policy suggestion can be drawn from this, centralised awqaf organizations are necessary, particularly in view of waqfs whose founders have perished. But they should not be involved in direct day to day management. Instead they should quickly hand over the waqfs under their management to selected trustees whose income are directly linked to the performance of the waqfs they manage. Looked from this perspective, appendix number 137's importance becomes obvious.

INVESTMENT

The following Islamic partnership forms are considered by the law (Appendix #208) as appropriate methods of investment of the *corpus*:

a) *Mudaraba*.

The draft law allows even the risky *mudaraba* thus confirming Imam Zuhar's original ruling back in the eighth century that was hardly ever practiced. This is a revolutionary permission and should be applauded. It combines *mudaraba* with *waqf* – two powerful institutions. This constitutes the ultimate support given to entrepreneurship as *waqf* funds constitute long term funds, exactly what entrepreneurs need. This is a revolutionary step. Indeed, permitting *waqf* funds to be invested in *mudaraba* partnerships opens the way for venture capital type of investments thus facilitating the birth of this important sector in the Islamic world.

b) *Musharakah mutanakisah*

c) Leasing

d) *Ijara* tayn, thus confirming the centuries' long Ottoman practice

e) Joint-stock company shares, confirming the 1907 and 1908 fatwas. But these fatwas had also permitted perpetual bonds as *waqf corpus*. Islamic perpetual bonds, *esham*, should also be accepted as *waqf corpus* as they are Shari'ah based and are not involved in *riba*.

- f) Islamic investment funds
- g) Investment accounts in Islamic banks
- h) *Mudaraba* accounts with Islamic banks
- i) *Istisna'a*
- j) *Mudaraba* within *Istisna'a*
- k) *Murabaha*
- l) *Muzara'a*

Finally, a suggestion: Although the classical law demands so, the amount a donor wishes to donate should not be limited to one third of his wealth. After all, Shari`ah permits *hiba* without any limit. Put differently, a person while healthy, can give his entire wealth as a gift to any person. The only condition being that the beneficiary actually receives it. Thus the one-third limit can and should be exceeded with the new law. After all, in the United States, Bill Gates and Warren Buffet donated 90 per cent of their wealth. Are Muslims less altruistic than these Americans?

CONCLUSION:

Within the time limit I was given, I have been able to pinpoint only to some of the salient points of the IDB/IRTI and KPF draft law. Subject to the caveats and suggestions I have made, my overall impression of this draft law is highly positive. If the draft, indeed, becomes a universal law of waqfs, its authors would have done a great service to the Islamic world.

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